

REMARKS

Claims 22 -47 are pending. These were rejected in the Office Action of July 14, 2003 as follows: (1) claims 22, 26 - 37, 40, 41, 44 and 45 as anticipated under 35 USC 102 by Tapp; and (2) claims 23 - 25, 38, 39, 46 and 47 as unpatentable under 35 USC 103 over Tapp in view of Braun et al.

These rejections are respectfully traversed.

Initially it is noted that claims 42 and 43 are noted rejected over art, and accordingly it is assumed that they are allowable over the art of record.

Regarding the rejected claims, it is first noted that Tapp cannot anticipate claims 22, 26 - 37 , 40, 41, 44 or 45 because it does not include in its teaching three layers as is claimed. If every positively recited limitation in a claim is not found in the applied reference under 35 USC 102, then 35 USC 102 cannot be applied. See, *In re Bond*, 15 USPQ2d 1566 (Fed. Cir. 1990). In *Bond*, the Federal Circuit instructed that "...every element of the claimed invention must be *identically* shown in a single reference...." for anticipation (emphasis added). Claim 22 defines the composite material to include "a first layer," "a second film layer," and "a third layer." Without any further discussion, it can be concluded that Tapp cannot anticipate claim 22 if it does not teach three layers. At best, Tapp teaches two layers but not three. Reference is made to the Summary of the Invention in column 3 and 4 of Tapp. Here there really is only one layer. (the two layers are discussed in the alternative not together.) Column 5 of Tapp does mention two layers but not three.

In addition, claim 22 recites very specific dimensional parameters of the material in the layers. Here again, Tapp is deficient. The examiner discusses the product-by-product


feature (the melt blown process) and, essentially advises, that this feature is being ignored and that this is appropriate if the “product in the product-by-process claim is the same or obvious from a product of the prior art,” citing In re Thorpe. Thorpe does teach that the process aspect cannot lend patentability to the claim if the prior art product is the same. But here the prior art product of Tapp *is not the same* so that the process limitation should not be dismissed but applied, and when applied it acts to further distinguish claim 22 over Tapp.

As to Braun et al, the examiner cites it for their teaching of moisture removal. But it is not and cannot be applied for the three layer feature. As such, the references lack a three layer teaching like that of claim 22.

In view of the foregoing, the examiner is urged to reconsider her rejections and find claims 22-41 and 44 - 47 allowable along with claims 42 and 43.

Respectfully submitted,

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